

# NOTICE OF CLAIM

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA (SMALL CLAIMS COURT)

REGISTRY FILE NUMBER <b>72126</b>
REGISTRY LOCATION <b>SURREY</b>

## FROM:

Fill in the name, address and telephone number of the person(s) or business(es) making the claim.

NAME **PERMINDER S. TUNG**

ADDRESS **8380 171 STREET**

CLAIMANT(S)

CITY, TOWN, MUNICIPALITY **SURREY**

**British Columbia**

PROV. **V4N0A9**

TEL # **778-320-8481**

## TO:

Fill in the name, address and telephone number of the person(s) or business(es) the claim is against.

NAME **APPLE CANADA INC.**

ADDRESS **#350 - 10851 SHELLBRIDGE WAY**

DEFENDANT(S)

CITY, TOWN, MUNICIPALITY **RICHMOND**

**British Columbia**

PROV. **V6X2W8**

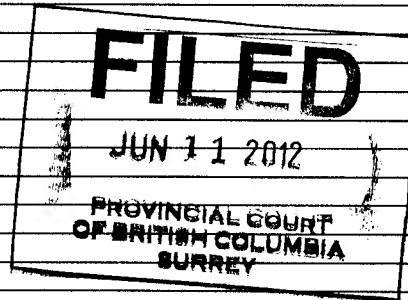
TEL # **1-800-MY-APPLE**

## WHAT

## HAPPENED?

Tell what led to the claim.

**SEE ATTACHED "NOTICE OF CLAIM" (6 PAGES)**



☒ If you need more space to describe what happened, attach another page, mark it "Page 2 of the Notice of Claim" and check this box. A copy of the attached page must accompany each copy of the Notice of Claim

## WHERE?

Tell where this happened.

CITY, TOWN, MUNICIPALITY **SURREY**

**British**

PROV. **Columbia**

## WHEN?

Tell when this happened.

**SEE NOTICE OF CLAIM**

**MAY 23 2012**

## HOW

## MUCH?

Tell what is being claimed from the defendant(s). If the claim is made up of several parts, separate them here and show the amount for each part. Add these amounts and fill in the total claimed.

**a TIMECAPSULE - 500GB**

\$

**b REPLACEMENT WIRELESS WIFI ROUTER**

\$

**c REPLACEMENT BACK-UP HARDDRIVE**

\$

**d LOSS OF DATA AND HISTORY WITHIN TIMECAPSULE**

\$

**e**

\$

**TOTAL**

**25,000.00**

**+ FILING FEES**

**156.00**

**+ SERVICE FEES**

**20.00**

**= TOTAL CLAIMED**

**\$25,176.00**

☐ DEBT  
☒ OTHER THAN DEBT

### TIME LIMIT FOR A DEFENDANT TO REPLY

The defendant must complete and file the attached reply within 14 days from being served with this notice, unless the defendant settles this claim directly with the claimant. If the defendant does not reply, a court order may be made against the defendant without any further notice to the defendant. Then the defendant will have to pay the amount claimed plus interest and further expenses.

The Court Address for filing documents is:

**SURREY PROV. CT. - SMALL CLAIMS**

**14340 - 57TH AVENUE**

**SURREY, BC V3X 1B2**

court copy

court copy

No.  
SURREY REGISTRY

**IN THE PROVINCIAL COURT OF BRITISH COLUMBIA**

Between

**PERMINDER S. TUNG**

Claimant

And

**APPLE CANADA INC.**

Defendant

**NOTICE OF CLAIM**

**Part 1: STATEMENT OF FACTS**

1. The Plaintiff, Perminder S. Tung (hereinafter the "Plaintiff") is a lawyer and resides at 8380 171 Street in the City of Surrey, in the Province of British Columbia.
2. The Defendant Apple Canada Inc. (hereinafter "Apple") is a company incorporated under the laws of Ontario, Canada and is registered as an extraprovincial company under the laws of British Columbia. Apple Canada Inc. has its Head Office at Suite 350 – 10851 Shellbridge Way, in the City of Richmond, in the Province of British Columbia, and an attorney within British Columbia at Suite 2900 – 550 Burrard Street, in the City of Vancouver, in the Province of British Columbia.
3. Pursuant to a contract, part written and part oral, between the Plaintiff and Apple, dated June 19, 2009, the Plaintiff purchased a TimeCapsule 500GB with part number MB764AM/A (hereinafter the "TimeCapsule").
4. The Plaintiff expressly or by implication made known to Apple, and its representatives, the particular purpose for which the TimeCapsule was required. Particulars of which include, but are not limited to:

- a. a strong and reliable Wi-Fi wireless router;
  - b. a reliable back-up hard drive that will securely store data for two macbooks and an iPhone; and
  - c. if the product were to fail, the stored data would be retrievable.
5. The Plaintiff relied on Apple, its skill and judgment, and that of Apple's sales representatives.
6. The TimeCapsule is a product that is sold in Apple's usual course of business, amongst numerous other technological devices. Apple is marketed as an industry leader and technological innovator.
7. On or about May 14, 2012 the Plaintiff discovered that the TimeCapsule was powered off and no longer functioning as usual.
8. On or about May 16, 2012 the Plaintiff called Apple's tech support who refused to troubleshoot the matter as the product was alleged to be no longer under warranty.
9. On or about May 17, 2012 the Plaintiff took the TimeCapsule into Simply Computing, Langley, an authorized Apple distributor. The Plaintiff was told by Simply Computing representatives to take the TimeCapsule back to the original Apple Store where it was purchased.
10. On or about May 23, 2012 the Plaintiff attended a scheduled appointment with the "Genius Bar" at Apple Store, Pacific Centre. Eric Brooke, described as "Genius" on his business card, inspected the TimeCapsule. Mr. Brooke indicated that the data in the TimeCapsule was lost and unretrievable. Mr. Brooke admitted that the product has had numerous issues, which were due in part to design flaws. He indicated that a product recall had taken place on the TimeCapsule, but that my particular model was outside of the recall time frame. Mr. Brooke offered on behalf of Apple to replace the product for \$252 plus tax. The Plaintiff rejected that offer.
11. The Plaintiff investigated the issue on Apple's website and learned that a significant

number of people were having similar issues with their TimeCapsules, and the apparent problem is a defect in the design and/or power supply. Particulars of these reported problems will be provided as requested and at trial.

12. The defect with the TimeCapsule, which invariably destroyed the stored data, amounts to a fundamental and total breach of contract. The alleged "Time Capsule" did not encapsulate and protect the information it was intended to secure. The breach destroyed the workable character of the thing sold.
13. In an effort to mitigate, the Plaintiff has replaced the TimeCapsule with a similar wireless router and backup hard drive, both expenses form part of this claim.
14. Unfortunately, the iPhone which was backed-up on the TimeCapsule failed before the new back up hard drive was purchased. The data from the iPhone is forever lost, at the hands of the failed TimeCapsule. The iPhone contained important information and memories around the birth of the Plaintiff's first child and other significant memories.
15. Furthermore, historical data on the TimeCapsule has also been lost.
16. As a result of the breach of contract and negligence of Apple and its employees or as the case may be, the Plaintiff has suffered losses, including cost of replacement devices and loss of data, particulars of which will be delivered as requested and at trial.
17. As a further result of the breach of contract and negligence of Apple and its employees or as the case may be, the Plaintiff has suffered and continues to suffer certain special damages, particulars of which will be delivered as requested and available.

## **Part 2: RELIEF SOUGHT**

1. Cost of the TimeCapsule at \$368.48;
2. Cost of replacement wireless router and back up hard drive;
3. Financial compensation for loss of data;
4. Special damages;
5. Costs;

6. Interest pursuant to the *Court Order Interest Act*, RSBC 1996, c. 79; and
7. Such further and other relief as this Honourable Court may deem just.

### **Part 3: LEGAL BASIS**

#### Breach of Contract and Warranty

18. The Plaintiff claims against Apple for breach of contract to provide a working TimeCapsule as marketing and covered by express and implied warranties.
19. The Plaintiff claims against Apple for breach of the warranty agreement, if any.

#### Sale of Goods Act

20. In the alternative, the Plaintiff relies on the implied warranties pursuant to the *Sale of Goods Act*, RSBC 1996, c. 410 ("*Sale of Goods Act*"), including the warranties of reasonable fitness, fitness for a purpose, merchantable quality, description and durability.
21. The court in *Great West Van Conversions Inc. v. Langevin*, 2000 BCSC 1830 ("*Great West*") indicates at paragraph 37 that there is a "low threshold" with respect to establishing a breach of the "reasonably fit" standard under section 18(a) of the *Sale of Goods Act*.
22. In *Great West*, Romily J. described the applicable test in the following terms:

[22] The difficult issue to be decided is whether or not the facts demonstrate a breach of the implied conditions as to quality or fitness under the Act. Fridman in *Sale of Goods in Canada* 4th ed. (Scarborough: Carswell, 1995) sums up the test to be applied under section 18 as follow:

For the buyer to succeed in making a case of breach of the implied condition, he must show "that the defect was such as to destroy the workable character of the thing sold thereby amounting to a fundamental and total breach of the contract." He cannot succeed, however, if he receives what he ordered, even if there is a lack of quality or fitness.

23. Section 18(b) of the *Sale of Goods Act* sets out the warranty of merchantable quality.

24. Section 18(c) of the *Sale of Goods Act* sets out the warranty of durability.
25. Section 56 of the *Sale of Goods Act* codifies the nature and extent of damages available in respect of a breach of warranty.
26. Section 56(2) of the *Sale of Goods Act* sets out that the measure of damages for breach of warranty, which is the estimated loss directly and naturally resulting in the ordinary course of events, including consequential damages.
27. The Court in *T-Bar Contracting Ltd. v. Woodland Equipment Inc.*, 2010 BCSC 1036, 2010 CarswellBC 1979 held as follows in respect of breaches of the implied warranties of fitness and merchantability:

[113] The measure of damages is to be assessed so that the plaintiff is to be placed in the same position as if the contract had been performed as agreed or contemplated. The plaintiff is entitled to all direct costs flowing from the breach, any consequential indirect costs and the loss of projected profits: *Road King v. Farr Fabricating*, 141 A.C.W.S. (3d) 234, 2005 BCSC 911 at paras. 127 to 130.

28. Section 20 of the *Sale of Goods Act* prohibits parties from contracting out of the implied warranty terms set out in section 18 of the Act.

Business Practices and Consumer Protection Act

29. The Plaintiff further relies on the *Business Practices and Consumer Protection Act*, SBC 2004, c.2 (“*Business Practices and Consumer Protection Act*”).
30. Section 5 of the *Business Practices and Consumer Protection Act* stipulates that the supplier must not commit or engage in a deceptive act or practice in respect of a transaction.
31. Section 4(1) of the *Business Practices and Consumer Protection Act* defines “deceptive act or practice” as an oral, written, visual, descriptive or other representation by a supplier, including conduct by a supplier, that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor.
32. Section 4(3) of the *Business Practices and Consumer Protection Act* set out the

meaning of a deceptive act or practice by setting out some activities that constitute such acts or practices; including but not limited to: representations by the supplier that the goods are new; have certain performance characteristics; components; are of a particular standard, quality, or model.

33. Sections 171 and 172 of the *Business Practices and Consumer Protection Act* set out the remedies and damages available under the Act.

Negligence

34. The Plaintiff claims against Apple for negligent repair and maintenance of the TimeCapsule and/or negligent design or defect.
35. The Plaintiff relies on the law of negligence and the *Negligence Act*, RSBC 1996, c. 333.

Dated: June 11, 2012

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Signature of the Plaintiff:  
PERMINDER S. TUNG

THIS NOTICE OF CLAIM is prepared by Perminder S. Tung, Esq., whose address for service is 8380 171 Street, Surrey, British Columbia, V4N 0A9. Tel: 778-320-8481